SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. .....

DEWEY BRILLHART, ADMINISTRATOR OF THE ESTATE OF JAMES DWIGHT BRILLHART, DECEASED, PETITIONER,

VS.

THE EXCESS INSURANCE COMPANY OF AMERICA, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE 10TH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

CLARENCE C. CHILCOTT,
918 Scarritt Building,
Kansas City, Missouri,
STUART T. MCALISTER,
Parsons, Kansas,
Attorneys for Petitioner.

RATNER, MCALISTER & MATTOX,
Of Counsel.

INDEX.

Subject Index.

Petition for Writ of Certiorari..... 1

Summary Statement..... 2

Questions Presented..... 3

Reasons for the Writ..... 4

Prayer..... 5

Brief in Support of Petition for Writ of Certiorari—

Opinion of the Court Below..... 7

Jurisdiction..... 8

Statement of the Case..... 8

The Facts..... 10

Summary of Argument..... 11

Argument..... 13

Conflict Between Jurisdictions..... 22

Conclusion..... 27

Appendix A—

Declaratory Judgment Act, Judicial Code, 274d, 28 U.S.C.A. 400..... 31

Appendix B—

R. S. Mo. 1939, Sec. 1560..... 32

R. S. Mo. 1939, Sec. 6009..... 32

Table of Cases Cited.

Aetna Casualty & Surety Co. vs. Quarles, 92 Fed. (2d) 321 (CCA 4, 1937) 4, 17, 22
Aetna Casualty Co. vs. Yeatts, 99 Fed. (2d) 665, CCA 4, 1938 17
Aetna Life Ins. Co. vs. Haworth, 300 U. S. 227, 57 S. Ct. 461, 463, 81 L. ed. 617, 108 A. L. R. 1000 .. 16
American Automobile Ins. Co. vs. Freundt, 103 Fed. (2d) 613, CCA 7, 1939 ..... 4, 17, 22, 24

Brandon vs. Power, 224 Mo. App. 858, 41 S. W. (2d) 879. 20
Brucker vs. Georgia Casualty Co., 14 Fed. (2d) 688 (D.C. E.D. Mo. E.D., 1926) 14

Cole vs. Cunningham, 133 U. S. 107, 10 S. Ct. 269, 37 L. ed. 536 28
Cook vs. McCoy, 118 S. W. (2d) 1043 (not officially reported). 20
Cowell vs. Employers Indemnity Corp., 326 Mo. 1103, 34 S. W. (2d) 705 ..... 15, 20

Davies vs. Maryland Casualty Co., 89 Wash. 571, 154 P. 1116, 155 P. 1035, L. R. A. 1916D, 395, 398 .. 16

Electrical Fittings Corp., et al., vs. Thomas & Betts Co., et al., 59 S. Ct. Rep. 860, 307 U. S. 241, 83 L. ed. 1263 5
Empire State Surety Co., Matter of, 214 N. Y. 553, 108 N. E. 825 16
Employers Liability Assurance Corp., Ltd. vs. Ryan, 109 Fed. (2d) 690, CCA 6, 1940; certiorari granted 310 U. S. 621, 60 S. Ct. Repr. 1097 .... 28, 29
Erie R. Co. vs. Tompkins, 304 U. S. 64, 58 S. Ct. Rpr. 87, ... L. ed. 15

First National Bank vs. Turnbull, 16 Wall. 190, 21 L. ed. 296 14
Frohoff vs. Casualty Reciprocal Exchange, 113 S. W. (2d) 1026 15
Frye vs. Ry., 157 Minn. 52, 195 N. W. 629; certiorari denied 263 U. S. 723, 44 S. Ct. 231; 68 L. ed. 525 28

Gay vs. Ruff, 54 S. Ct. 608, 292 U. S. 25, 78 L. ed. 1099 5
General Accident Fire & Life Assur. Corp. vs. Butler's Ice Cream Factory (Tex. Civ. App.), 291 S. W. 674 16
Godman vs. Gordon, 61 Mo App. 685 14
Goerss vs. Indemnity Co. of America, 223 Mo. App. 316, 3 S. W. (2d) 272; Certiorari quashed State ex rel. Indemnity Co. of America vs. Dawes, 321 Mo. 1035, 13 S. W. (2d) 1059 15
Graff vs. Continental Auto Ins. Underwriters, 225 Mo. App. 85, 35 S. W. (2d) 926 ..... 15, 20
Griffin vs. General Casualty & Surety Co., 231 Mich. 642, 204 N. W. 727 16

Homan vs. Employers Reinsurance Corporation, 345 Mo. 650, 136 S. W. (2d) 289 28

Johnson vs. Geneva Publishing Co.; et al., 122 Mo. 102, 26 S. W. 676 20
Juskiewicz vs. New Jersey Fidelity & Plate Glass Ins. Co., 210 App. Div. 675, 206 N. Y. S. 566 .. 16

Kepner vs. C. C. C. & St. L. Ry. Co., 322 Mo. 299, 15 S. W. (2d) 825; certiorari denied 280 U. S. 564, 50 S. Ct. 24, 74 L. ed. 618 28
Kinnan vs. Hurst Co., 317 Ill. 251, 148 N. E. 12 16
Kurre vs. Indemnity Co. of Galveston, Texas, 223 Mo. App. 406, 17 S. W. (2d) 685 15

Lajoie vs. Central Western Cas. Co. of Detroit, Michigan, 228 Mo. App. 701, 71 S. W. (2d) 803-804 . . 29
Lewis vs. United Air Lines Transportation Corp., 34 Fed. Supp. 124, D. C. D. Conn. 1939, p. 125 22

Maryland Casualty Co. vs. Peppard, 53 Okl. 515, 157 P. 106, L. R. A. 1918E, 597 16
McDermott vs. Donegan, 44 Mo. 85, 89 20
Mutual Reserve Fund L. Assn. vs. Phelps, 190 U. S. 147, l. c. 159, 47 L. ed. 987 14

N. C. & St. L. Ry. Co. vs. Wallace, 288 U. S. 249, 53 St. Ct. Rep. 345, l. c. 347 22

Patterson vs. Adan, 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184 16
Peoples Bank vs. Hoppe, et al., 111 S. W. 1190, l. c. 1192 (not officially reported) 20

Reilly vs. Linden, 151 Minn. 1, 186 N. W. 121 16
Russell vs. Zurick Accident & L. Ins. Co., 14 Fed. (2d) 688 (D.C. E.D. Mo. E.D., 1926) 14

Sanders vs. Frankford Marine, Accident & Plate Glass Ins. Co., 72 N. H. 485, 57 A. 655, 101 Am. St. Rep. 688 16
Shaw vs. R. R., 314 Mo. 123, 282 S. W. 416 28
South Central Securities Co. vs. Vernon, 227 Mo. App. 486, 54 S. W. (2d) 416 20
State Farm Mutual Insurance Co. vs. Hugee, et al., 115 Fed. (2d) 298 (CCA 4, 1940) 4, 21
St. Louis Dressed Beef & Provision Co. vs. Maryland Casualty Co., 201 U. S. 173, 26 S. Ct. 400, 50 L. Ed. 712 16
Stephens vs. Pennsylvania Casualty Co., 135 Mich. 189, 97 N. W. 686, 3 Ann. Cas. 478 16
Stoner vs. N. Y. Life Ins. Co., . . . U. S. . . . , 61 S. Ct. 336, 85 L. ed. 275 15

Thompson vs. Moore, 109 Fed. (2d) 372 (CCA 8, 1940). 4, 22, 27

Tinsley vs. Savage, 50 Mo. 141. 14

U. S. F. & G. vs. Koch, 102 Fed. (2d) 288, 123 A. L. R. 279 (CCA 3, 1939). 16, 17

Walker, to Use of Forestel, vs. American Automible Ins. Co., 229 Mo. App. 1202, 70 S. W. (2d) 82. . 15, 20

Wehrhan vs. Fort Dearborn Casualty Underwriters of Chicago (Monehan, Garnishee), 221 Mo. App. 230, 1 S. W. (2d) 242, l. c. 243. 20

Worcester County Trust Co. vs. Riley, 58 S. Ct. 185, 302 U. S. 292, 82 L. ed. 268. 5

Statutes Cited.

R. S. Missouri 1929, Sections 1396 and 5898. 14

R. S. Mo. 1929, Section 1396. 29

R. S. 1929, Sec. 1397. 14

R. S. 1939, Sec. 1561. 14

R. S. 1939, Sections 1560 and 6009-10. . . . . 14, 15

R S. Mo. 1939, Section 1560. 29

Sec. 1560, R. S. Mo. 1939, being Sec. 1396, R. S. 1929 32

Sec. 6009, R. S. Mo. 1939, being Sec. 5898, R. S. 1929 32

General Code of Ohio, Secs. 9510-3-4. 29

Code of Laws of United States of America, Sec. 400, Title 28 (Judicial Code 274d, 28 U.S.C.A. 400). . 31

Code of Laws of the United States of America, Sec. 71, Ch. 3, Title 28 (Sec. 28 of the Judicial Code) 27

Declaratory Judgment Act, being Section 274d of the Judicial Code (28 U.S.C.A. 400). 5

References.

Drake on Attachments, Sections 517 and 672, pages 456 and 602 (6th Ed.) 20

Professor Borchard, Principles Governing Rendition of Declaratory Judgments, pages 107-11 17

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. .....

DEWEY BRILLHART, ADMINISTRATOR OF THE ESTATE OF JAMES DWIGHT BRILLHART, DECEASED, PETITIONER,

VS.

THE EXCESS INSURANCE COMPANY OF AMERICA, A CORPORATION, RESPONDENT.

PETITION FOR WRIT OF CERTIORARI.

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

The petition of Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, deceased, for a writ of certiorari directed to the United States Circuit Court of Appeals for the Tenth Circuit to bring before the Supreme Court the case of *The Excess Insurance Company of America, a corporation, Plaintiff-Appellant, vs. Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, deceased, Defendant-Appellee.*

Said petitioner respectfully shows to this Honorable Court as follows:

SUMMARY STATEMENT.

The proper interpretation of the Declaratory Judgment Act (Judicial Code, Sec. 274d, 28 U.S.C.A. 400), is involved in this law suit. (See Appendix A.)

The opinion of the Tenth Circuit Court of Appeals (R. 44) is erroneous in the following respects:

(a) It holds that the District Court must determine the issues in a declaratory judgment suit even though the law of Missouri provides another more appropriate, more suitable and more effective statutory remedy (R. S. Mo. 1939, Sections 1590 and 6009, being Revised Statutes, 1929, Sections 1396 and 5898, respectively; see Appendix B); and that under such circumstances the District Court, after becoming familiar with the pleadings and after hearing the statements of the respective parties as to the facts, cannot, in its discretion, refuse to entertain a bill for a declaration.

(b) It involves a misconception of the source of liability of The Excess Insurance Company of America to Petitioner.

(c) It misconceives the law in holding that the Circuit Court of Jackson County, Missouri, could not determine the liability of The Excess Insurance Company of America to Petitioner.

(d) It is conflicting and self-contradictory in holding that District Courts, while having jurisdiction to determine actions pending in courts of concurrent jurisdiction between the same parties involving the same subject-matter, and where the decision of the District Court

could adjudicate all of the rights of the parties may, within its discretionary powers, refuse to entertain jurisdiction, and at the same time holding that the District Court for the District of Kansas did not have such discretionary powers in this case under identical circumstances.

(e) It holds that a cause may be removed on execution and garnishment from the state court of Missouri to a federal court in Kansas by way of a declaratory judgment suit when such cause was not otherwise removable under the removal statutes and thereby attempts to enlarge the jurisdiction of Federal Courts beyond the limits prescribed by the removal acts, and the adjudicated cases under the Declaratory Judgment Act.

QUESTIONS PRESENTED.

(1) Do District Courts enjoy a measure of discretion in the matter of granting or withholding declaratory relief?

(2) Does the existence of an equivalent adequate remedy in a case already pending in a state court, in which all of the relief sought in the District Court could be obtained in a single simple procedure in the state court, authorize the exercise of discretion to refuse relief under the Declaratory Judgment Act?

(3) May a cause pending in a state court of Missouri be removed therefrom to the United States District Court for the District of Kansas by way of a proceeding under the Declaratory Judgment Act?

REASONS FOR THE WRIT.

(1) The scope of the Declaratory Judgment Act and the meaning of Rule 57 of the Rules of Civil Procedure for the District Courts of the United States are both here involved. Both are in the foreground of developing tendencies of the law and are of great general importance and interest and their application to cases involving proceedings in state courts should be determined and settled by this court.

(2) The opinion of the Court of Appeals is in conflict with the Fourth, Seventh and Eighth Circuits and said conflict should be heard and determined by this court.

(3) The Court of Appeals has decided a question of local law in a way probably in conflict with applicable local decisions.

(4) The Court of Appeals has decided an important question of Federal law which has not been but which should be settled by this court.

(5) The Court of Appeals has decided a Federal question in a way probably in conflict with applicable decisions of this court.

The decision of the Circuit Court of Appeals is in conflict with the following cases:

Aetna Casualty & Surety Co. v. *Quarles*, 92 Fed. (2d) 321 (CCA 4, 1937).

American Automobile Insurance Co. v. *Freundt*, 103 Fed. (2d) 603 (CCA 7, 1939).

Thompson v. *Moore*, 109 Fed. (2d) 372 (CCA 8, 1940).

State Farm Mutual Insurance Co. v. *Hughe, et al.*, 115 Fed. (2d) 298 (CCA 4, 1940).

BASIS OF JURISDICTION.

The jurisdiction of this court is invoked under Sec. 240 of the Judicial Code, as amended by Act of Congress February 13, 1925, Chapter 229, 43 Stat. 938 (28 U.S.C.A. 347).

The judgment of reversal sought to be reviewed was rendered on June 23, 1941 (R. 44), the motion for rehearing was denied August 28, 1941 (R. 49), and Petitioner files his petition for writ of certiorari within three months from August 28, 1941.

This action was based upon the laws of the United States, to-wit, the Declaratory Judgment Act, being Section 274d of the Judicial Code (28 U.S.C.A. 400, see Appendix A), and the lower court decided questions of substance involving matters of law, erroneously it is believed.

The following cases it is believed sustain the jurisdiction of this court to issue its writ of certiorari:

Worcester County Trust Co. v. *Riley*, 58 S. Ct. 185, 302 U. S. 292, 82 L. ed. 268.

Gay v. *Ruff*, 54 S. Ct. 608, 292 U. S. 25, 78 L. ed. 1099.

Electrical Fittings Corp., et al., v. *Thomas & Betts Co., et al.*, 59 S. Ct. Rep. 860, 307 U. S. 241, 83 L. ed. 1263.

Prayer.

WHEREFORE, your Petitioner respectfully prays that a writ of certiorari be issued under the seal of this court directed to the United States Circuit Court of Appeals for the Tenth Circuit, commanding that court to certify

and send to this court for its review and determination on a day certain therein named a full and complete transcript of the record and proceedings in the case of The Excess Insurance Company of America, a corporation, Appellant, vs. Dewey Brillhart, Administrator of the Estate of James Dwight Brillhart, Deceased, Appellee; No. 2223, to the end that this cause may be reviewed and determined by this court as provided for in the statutes of the United States, and that said decree and judgment of the United States Circuit Court of Appeals for the Tenth Circuit may be reversed by this Honorable Court and that of the District Court affirmed, and that your Petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just.

CLARENCE C. CHILCOTT,
STUART T. MCALISTER,
Attorneys for Petitioner.

RATNER, MCALISTER & MATTOX,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941.

No. .....

DEWEY BRILLHART, ADMINISTRATOR OF THE ESTATE OF JAMES DWIGHT BRILLHART, DECEASED, PETITIONER,

VS.

THE EXCESS INSURANCE COMPANY OF AMERICA, A CORPORATION, RESPONDENT.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINION OF THE COURT BELOW.

The opinion of the Circuit Court of Appeals for the Tenth Circuit was rendered June 23, 1941, appears in the record at page 44, and is reported in 121 Fed. (2d) 776. Petition for rehearing was filed July 23, 1941, and denied August 28, 1941. Petitioner's motion to dismiss in the District Court appears at page 19 and the order of the court sustaining the same at page 42 of the record.

JURISDICTION.

The jurisdiction of this court is invoked under Sec. 240 of the Judicial Code as amended by Act of Congress February 13, 1925, Chapter 229, 43 Stat. 938 (28 U.S.C.A. 347).

STATEMENT OF THE CASE.

The District Court granted petitioner's motion to dismiss after a consideration of the pleadings and hearing the statements of fact and arguments of respective counsel (R. 42).

The pertinent portions of the motion to dismiss (R. 19-20) so far as applicable to this proceeding are as follows, to-wit:

> "1. Because all matters and issues involved herein are involved in and fully determinable by the garnishment proceedings already pending and in progress on a judgment in the state court of Missouri at the time that the action herein for declaratory relief was commenced.
>
> 2. Because under the allegations of plaintiff's complaint a proper cause for declaratory relief is not stated or shown, and the court should exercise its judicial discretion not to entertain said suit;
>
> (a) Because plaintiff herein is merely attempting to have the court anticipate and decide issues involved and fully determinable in proceedings already pending and in progress in the Circuit Court of Jackson County, Missouri, at Independence;
>
> (b) Because the plaintiff herein is attempting to remove a cause from a state court into a Federal Court contrary to the provisions of the removal act;
>
> (c) Because the plaintiff herein is merely attempting to have this court act as a court of appeals

and review the proceedings had in the Circuit Court of Jackson County, Missouri, at Independence;

(d) Because the plaintiff is attempting to remove a cause from the Circuit Court of Jackson County, Missouri, to the Federal Court for the District of Kansas in violation of the removal act as such cause could only be removed to the Federal Court for the Western Division of the Western District of Missouri.

3. Because a declaratory judgment will not finally settle and dispose of the alleged controversy between plaintiff and this defendant concerning the question of the liability of the plaintiff under the policy as garnishment proceedings are pending in three other cases, identical with the one herein, in the Circuit Court of Jackson County, Missouri, and adjudication by declaratory judgment herein would be merely deciding the question piecemeal.

4. Because the co-defendant herein, Walter C. Young, died before the institution of this action for a declaratory judgment, and his administrator, Carlton R. Benton, Public Administrator of Jackson County, Missouri, is a non-resident of this judicial district and beyond the reach of process of this court and a multiplicity of suits will therefore not be avoided by the rendition of a declaratory judgment herein.

5. Because all of the parties interested, namely, Carlton R. Benton, Administrator of the Estate of Ralph Russell Phillips, deceased, Rex Phillips, Cooper-Jarrett, Inc., and Central Mutual Insurance Company of Chicago, Illinois, are necessary parties to a complete and final determination of the plaintiff's rights in the premises and are not made parties to this suit."

The Court of Appeals reversed said ruling of the District Court and thereby held that the District Court

could not under the circumstances, exercise its discretion to decline to define and declare the rights of the parties in the premises.

Petitioner respectfully submits that his motion was properly addressed to the District Court's discretion; and that there being no abuse of that court's discretion the decision of the Court of Appeals should have been one of affirmance.

THE FACTS.

Respondent carried a liability insurance policy covering other liability insurance policies issued by the Central Mutual Insurance Company of Chicago, Illinois, which, in turn, covered trucks owned or leased by Cooper-Jarrett, Inc. (R. 6, 8, 9).

Petitioner's decedent was killed as the result of negligence on the part of said Cooper-Jarrett, Inc., in October, 1934, and on December 4, 1935, petitioner filed suit against Cooper-Jarrett, Inc., for the sum of $25,000.00 and obtained judgment against Cooper-Jarrett, Inc., on April 22, 1939, for the sum of $20,000.00 (R. 9). At the time of the filing of respondent's bill for declaratory relief petitioner was pressing and prosecuting his claims against respondent through the processes of legal and equitable garnishment, upon the judgment which had been obtained against Cooper-Jarrett, Inc., in the Circuit Court of Jackson County, Missouri (R. 9-16), and no claim was made in the bill or at the hearing, upon petitioner's motion to dismiss, that all the questions, both legal and equitable, presented by said bill could not be determined in the garnishment proceeding (R. 16).

At the time of the hearing upon the motion to dismiss petitioner's cause in the Circuit Court of Jackson County, Missouri, was pending upon the answer of the garnishee (the respondent herein) (R. 32), as stated by counsel for respondent at the hearing upon the motion to dismiss (R. 33).

The purpose of respondent in this suit was to have interpreted the contract between Central Mutual Insurance Company of Chicago, Illinois, and respondent (R. 34). The garnishment proceedings ran directly to respondent (R. 38) and there were four identical cases (including that of petitioner) pending in the Circuit Court of Jackson County, Missouri, in which garnishment proceedings are pending against respondent (R. 28, 32, 40), being the cases of petitioner, Young, Phillips and Benton (R. 41).

SUMMARY OF ARGUMENT.

(1) The peculiar appropriateness of the remedy provided by Missouri by Sections 1590 and 6009, Revised Statutes of 1939, being Sections 1396 and 5898, respectively, R. S. 1929, coupled with the peculiar circumstances attending the adjudication of this case, to-wit, the pending in the Circuit Court of Jackson County, Missouri, of an action in which all of the matters sought to be adjudicated could have been adjudicated as fully and completely as herein; the death of petitioner's co-defendant after judgment against Cooper-Jarrett, Inc., and prior to the filing of respondent's bill for declaratory judgment, and the appointment of a personal representative in Missouri beyond the jurisdiction of the District Court for the District of Kansas; the pendency of two additional suits

against respondent upon garnishment in the Circuit Court of Jackson County, Missouri, involving identical issues, thereby rendering it impossible for respondent to have its liability upon its contract finally adjudicated by the District Court of Kansas; and the filing and dismissal of a declaratory judgment suit in the United States District Court for the Western Division of the Western District of Missouri against all four defendants (R. 28, 32, 40, 41) make it clear that the District Court properly exercised its discretion in dismissing respondent's bill as no purpose could be served by attempting to invoke the Declaratory Judgment Act and only a multiplicity of suits created.

(2) The District Court was authorized to decline to entertain jurisdiction of respondent's bill because of the existence of a complete and adequate remedy in a case already pending in a state court.

(3) The bringing of a declaratory judgment suit was merely an attempt by respondent to oust the state court of jurisdiction, to create a conflict of jurisdiction, and attempt to remove a nonremovable case from a state court to a Federal court and particularly to a wrong Federal court.

ARGUMENT.

At the outset of this argument petitioner feels required to take sharp issue with the lower court's conclusions that the issues in the present litigation could not be decided in the garnishment proceeding. Said the lower court, referring to respondent (R. 47):

> "No proceeding had been instituted in which its liability as a reinsurer of Central's risks was an issue. * * *. The liability of Central, if any, arose under the contract executed by it with Cooper-Jarrett, while the liability of appellant to appellees, if any, arose under a separate agreement between it and Central. The issues in the garnishment action could not determine the liability of appellant under its reinsurance contract."

No authority is cited for this broad statement of the law and if the court's conclusion is correct that the liability of respondent could not be determined in the garnishment proceedings then as a matter of law the court could render no judgment against respondent in said garnishment proceedings and respondent would be bound to prevail. However, whether or not the above quoted statement of the lower court is correct is to be decided by the law of the forum where the garnishment proceedings were pending. The above excerpt was the foundation upon which the lower court based its conclusion that the District Court had exceeded its jurisdiction in dismissing respondent's bill and in reversing and remanding the cause. Therefore, if the converse of said quoted portion of the opinion is the law of the forum where the garnishment proceedings were pending and the issues in the garnishment proceeding could determine the liability of respondent to petitioner under its contract

with Central, it logically follows that the major premise of the opinion being wrong the lower court erred in holding that the District Court exceeded its discretionary powers in dismissing the bill and in reversing and remanding the cause.

The statutes of Missouri referred to, to-wit, Sections 1396 and 5898, R. S. Missouri 1929, *supra*, provide that after judgment for plaintiff has been rendered the judgment creditor in aid of execution may summon garnishees (Sec. 1396). In fact, under Sec. 1397, R. S. 1929, being Sec. 1561, R. S. 1939, it is the duty of the officer when directed by the plaintiff, his agent or attorney, to summon such garnishees. The garnishment proceeding is not an independent suit but is merely in aid of execution auxiliary to the main suit and cannot be removed into a Federal Court, *Brucker* v. *Georgia Casualty Co.*, 14 Fed. (2d) 688 (D.C. E.D. Mo. E.D., 1926). *Russell* v. *Zurick Accident & L. Ins. Co.*, 14 Fed. (2d) 688 (D.C. E.D. Mo. E.D., 1926). *First National Bank* v. *Turnbull*, 16 Wall. 190, 21 L. ed. 296. *Mutual Reserve Fund L. Assn.* v. *Phelps*, 190 U. S. 147, l. c. 159, 47 L. ed. 987. *Godman* v. *Gordon*, 61 Mo. App. 685. *Tinsley* v. *Savage*, 50 Mo. 141. It retains the case's original number and comes on for hearing immediately after issue is joined, thus operating to effect an advancement of the hearing automatically. The entire file and docket is before the court. There is thus one file, one docket, one number, and one case. The garnishment proceedings are merely a continuation of the original cause in aid of execution and are so related thereto that it is fitting and proper that the District Court recognize the peculiar appropriateness of the statutory remedy.

The policy of the State of Missouri as established by Sections 1396 and 5898-9, R. S. 1929, being Sections

1560 and 6009-10, R. S. 1939, is to associate procedural litigation seeking to apply the proceeds of an insurance policy to the payment of a judgment with the litigation producing that judgment. This is an established policy of the State of Missouri as manifest by a long line of cases.

Goerss v. *Indemnity Co. of America*, 223 Mo. App. 316, 3 S. W. (2d) 272; Certiorari quashed *State ex rel. Indemnity Co. of America* v. *Dawes*, 321 Mo. 1035, 13 S. W. (2d) 1059.

Kurre v. *Indemnity Co. of Galveston, Texas*, 223 Mo App. 406, 17 S. W. (2d) 685.

Graff v. *Continental Auto Ins. Underwriters*, 225 Mo. App. 85, 35 S. W. (2d) 926.

Cowell v. *Employers Indemnity Corp.*, 326 Mo. 1103, 34 S. W. (2d) 705.

Frohoff v. *Casualty Reciprocal Exchange*, 113 S. W. (2d) 1026.

Walker, to Use of Forestel, v. *American Automobile Ins. Co.*, 229 Mo. App. 1202, 70 S. W. (2d) 82.

This policy should be respected in considering the application or non-application of the Declaratory Judgment Act. Certainly such a state policy is ample justification for the denial of declaratory relief in such a case as this. To hold otherwise would not be in accordance with the spirit underlying *Erie R. Co.* v. *Tompkins*, 304 U. S. 64, 58 S. Ct. Rpr. 87, ... L. ed. ....., and *Stoner* v. *N. Y. Life Ins. Co.*, ... U. S. ....., 61 S. Ct. 336, 85 L. ed. 275. It would be contrary to the general purpose of the Declaratory Judgment Act to reduce litigation and its costs. It has been uniformly held that said act must be construed to effectuate its purpose.

It is the policy of the courts of this country to compel the insurer to answer for the insured's liability.

General Accident Fire & Life Assur. Corp. v. *Butler's Ice Cream Factory* (Tex. Civ. App.), 291 S. W. 674; *Matter of Empire State Surety Co.*, 214 N. Y. 553, 108 N. E. 825; *St Louis Dressed Beef & Provision Co.* v. *Maryland Casualty Co.*, 201 U. S. 173, 26 S. Ct. 400, 50 L. Ed. 712; *Juskiewicz* v. *New Jersey Fidelity & Plate Glass Ins. Co.*, 210 App. Div. 675, 206 N. Y. S. 566; *Kinnan* v. *Hurst Co.*, 317 Ill. 251, 148 N. E. 12; *Sanders* v. *Frankford Marine, Accident & Plate Glass Ins. Co.*, 72 N. H. 485, 57 A. 655, 101 Am. St. Rep. 688; *Patterson* v. *Adan*, 119 Minn. 308, 138 N. W. 281, 48 L. R. A. (N. S.) 184; *Reilly* v. *Linden*, 151 Minn. 1, 186 N. W. 121; *Griffin* v. *General Casualty & Surety Co.*, 231 Mich. 642, 204 N. W. 727; *Stephens* v. *Pennsylvania Casualty Co.*, 135 Mich. 189, 97 N. W. 686, 3 Ann. Cas. 478; *Davies* v. *Maryland Casualty Co.*, 89 Wash. 571, 154 P. 1116, 155 P. 1035, L. R. A. 1916D, 395, 398; *Maryland Casualty Co.* v. *Peppard*, 53 Okl. 515, 157 P. 106, L. R. A. 1918E, 597.

Where there is an existing suit in which the questions could be decided descretion might warrant the denial of relief, *Aetna Life Ins. Co.* v. *Haiwarth*, 300 U. S. 227, 57 S. Ct. 461, 463, 81 L. ed. 617, 108 A. L. R. 1000; *U. S. F. & G.* v. *Koch*, 102 Fed. (2d) 288, 123 A. L. R. 279 (CCA 3, 1939). In the case of *Aetna Life Insurance Co.* v. *Haworth*, it is significantly stated, l. c. 463:

> "Defendants have not instituted any action wherein the plaintiff could have an opportunity to prove the absence of the alleged disability."

In other words, if an action had been pending in which the matters submitted in the Haworth case should have been submitted the court would have exercised a sound discretion in dismissing the bill. In the present case there was an action pending in which all of the matters complained of in respondent's bill could have been decided without recourse to another court. Furthermore, a petition for a declaratory judgment filed after the commencement of a suit in another court, the determination of which will ultimately decide the liability of the party petitioning for the declaration should be dismissed, *U. S. F. & G.* v. *Koch*, 102 Fed. (2d) 288, 123 A. L. R. 279, CCA 3, 1939; *Aetna Casualty & Surety Co.* v. *Quarles*, 92 Fed. (2d) 321, CCA 4, 1937; *Aetna Casualty Co.* v. *Yeatts*, 99 Fed. (2d) 665, CCA 4, 1938; *American Automobile Ins. Co.* v. *Freundt*, 103 Fed. (2d) 613, CCA 7, 1939.

The principles governing the rendition of declaratory judgments are set forth by Professor Borchard in his work at pages 107-11, as follows, to-wit:

> "• • • The two principal criteria guiding the policy in favor of rendering declaratory judgments are (1) when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue, and (2) when it will terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding. It follows that when neither of these results can be accomplished, the court should decline to render the declarations prayed. In addition, and perhaps as indicating when a useful purpose will not be served, statute and practice have established the rule that the judgment may be refused when it is 'not necessary or proper at the time under all the circumstances.'
>
> "• • •

"The uncertainty would not be terminated where the proceedings indicate the absence or failure to join necessary parties in interest who ought to be heard or bound. * * *

"On the ground that the uncertainty would not be terminated, the courts usually refuse to make declarations where they consider that further proceedings are necessary to enable the plaintiff to obtain the relief he needs or to make the judgment effective.

"* * *

"Reference will hereafter be made to the fact that the court will refuse a declaration where another court has jurisdiction of the issue, where a proceeding involving identical issues is already pending in another tribunal, where a special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstances. * * *

"* * *, it serves no sensible end to permit a plaintiff to appear as equitable actor and start the proceedings for an autonomous declaration that he has a good defense to his opponents *pending* or *immediate* action. * * *

"The declaration will be refused where in the court's opinion it is expedient, for some reason outside the record, such as public policy, or *where the question might be raised again in some other way* or where it would be *embarrassing in the operations of government*. It may also be refused where by laches or default or inequity the plaintiff has weakened his claim to relief. * * *"

And, further, on page 155, he said:

"* * *. If the court believes that a pending suit will better settle the issue or that a declaration will not satisfactorily dispose of the case or *satisfy*

the plaintiff's needs or the demands of public policy, it may in its discretion withhold the declaration."

On pages 179-182, he said:

"* * *, where a suit or proceeding is already *pending involving the same issues,* it is manifestly unwise and unnecessary to permit a new petition for a declaration to be initiated by the defendant or the plaintiff in that suit, * * *. The first court seized of the issues involved, if identical whether by action for a declaratory or other judgment must be permitted to retain jurisdiction of the case. Nor as already observed, will the court permit a special tribunal having statutory jurisdiction of the express type of case *sub judice* or given jurisdiction by agreement of the parties to be ousted of its jurisdiction by a petition for a declaration in the ordinary courts. *Nor will a final judgment generally be permitted to be opened or even questioned or, as a rule, clarified by a collateral suit for a declaration* * * *. *The declaratory action is not a substitute for a new trial or an appeal from a former judgment deciding identical issues or issues which the court believes were passed upon.*"

"On the other hand there may occasionally be a sound reason why an executory action or non-declaratory action is given preference over a suit for a declaration, either because the declaration will not completely dispose of the issue or because the court believes coercive relief or a different form of action better suited to the plaintiff's need. * * *" (Italics ours.)

Under the law of the State of Missouri the question of respondent's liability can be fully determined in a garnishment proceeding, because the plaintiff's rights are founded upon those of the defendant and can rise no higher than the defendant's rights and any defense which

the garnishee (respondent) could assert against defendant, Cooper-Jarrett, Inc., can also be asserted against petitioner, Drake on Attachments, Sections 517 and 672, pages 456 and 602 (6th Ed.); *McDermott* v. *Donegan*, 44 Mo. 85, 89; *Cowell* v. *Employers Indemnity Corp.*, 326 Mo. 1103, 34 S. W. (2d) 705; *Walker to Use of Foristel* v. *American Auto Ins. Co.*, 229 Mo. App. 1202, 70 S. W. (2d) 82; *Graff* v. *Continental Auto Underwriters*, 225 Mo. App. 85, 35 S. W. (2d) 926; *Brandom* v. *Power*, 224 Mo. App. 858, 41 S. W. (2d) 879; *Cook* v. *McCoy*, 118 S. W. (2d) 1043 (not officially reported); *Peoples Bank* v. *Hoppe, et al.*, 111 S. W. 1190, l. c. 1192 (not officially reported); *Johnson* v. *Geneva Publishing Co., et al.*, 122 Mo. 102, 26 S. W. 676; *Wehrhan* v. *Fort Dearborn Casualty Underwriters of Chicago (Monehan, Garnishee)*, 221 Mo. App. 230, 1 S. W. (2d) 242, l. c. 243.

To recover against a garnishee plaintiffs must prove facts which would enable the alleged defendant debtor to maintain a suit against the garnishee. *South Central Securities Co.* v. *Vernon*, 227 Mo. App. 486, 54 S. W. (2d) 416. It is, therefore, seen that every issue concerning the liability of respondent to petitioner can be decided in the garnishment proceedings as fully and completely as it can in the present suit and it is clearly the duty of this court to give effect to the decisions of the appellate courts of the State of Missouri in arriving at its decision. Furthermore, the Missouri court has jurisdiction of petitioner, respondent, defendant and the Central Mutual Insurance Company of Chicago, and is, therefore, in a much better position than the District Court of Kansas to decide the issues involved.

The liability of the respondent in this case will not and cannot be finally determined in this action. Respondent is attempting a piecemeal adjudication of its liability. All the parties connected with this litigation and all the claimants under the policy and contract executed by the Excess and Central are not parties to this litigation and, consequently, their rights cannot be determined and, this being so, the liability of respondent is not determined; the rights of all interested parties are not determined, and respondent's bill was properly dismissed. A similar situation existed in the case of *State Farm Mutual Automobile Ins. Co.* v. *Hugee, et al.*, 32 Fed. Supp. 665, affirmed 115 Fed. (2d) 298, in which the District Court in commenting upon a similar situation said, l. c. 670:

> "To entertain jurisdiction would mean then the trial of all issues of fact relative to the liability of the bus companies, the bus driver, the truck driver, and Patton's, Inc., to the injured defendants, together with the accompanying questions of the extent of injury to each. How would the Court approach this tremendous task? Twelve people with different injuries, different doctors, it is assumed, and different lawyers. Testimony would be prolix, cross examination and argument of counsel interminable. Only the question upon the coverage should be cognizable in the declaratory action. Should the Court first go into this issue bringing all parties to a trial first upon the question of whether or not McRae at the time was acting within the scope of his employment? Should the jury answer 'No,' of course Patton's Inc., and the plaintiff would be eliminated in so far as any liability existed on the part of Patton's Inc., but, should the jury answer 'Yes,' then every one must come back into Court for another trial which would then be a straight tort action in which the plaintiff would really have no place, for the fact of insurance would be before the jury with no liability on the part of the

plaintiff to the injured defendant unless Patton's Inc., became insolvent and only then after judgment recovered."

A similar situation also existed in the case of *Lewis* v. *United Air Lines Transportation Corp.*, 34 Fed. Supp. 124, D. C. D. Conn. 1939, where, at page 125, will be found a lucid and able discussion of the elements to be considered in entertaining jurisdiction for a declaratory judgment in the case against some but not all of several injured persons. In this case Young was improvidently made a party after his death and certainly it cannot be contended that the rights of his personal representative can be adjudicated herein, although the opinion below appears to assume he is a party and an appellee. It will necessarily be adjudicated in the Circuit Court of Jackson County, Missouri, as will be the rights of the other claimants against respondent. All of the interested parties should be present in this litigation and there can be no final determination of respondent's rights or liability until they are all present in one action. It has been held that no judgment or decree will be rendered when all the parties who will be adversely affected are not before the court. *N. C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249, 53 S. Ct. Rep. 345, l. c. 347.

Conflict Between Jurisdictions.

The opinion of the lower court is not only directly in conflict with the cases of *Aetna Casualty & Ins. Co.* v. *Quarles*, 92 Fed. (2d) 321 (CCA 4, 1937), *American Automobile Ins. Co.* v. *Freundt*, 103 Fed. (2d) 603 (CCA 7, 1939), and *Thompson* v. *Moore*, 109 Fed. (2d) 372 (CCA 8, 1940), but is an attempt by the respondent by indirection to remove into a Federal Court a cause pending in a state

court which was otherwise not directly removable. Although these cases were called to the attention of the lower court a reference to the opinion will show that they were wholly ignored by said court. The Quarles and the Freundt cases are directly in point upon both the facts and the law. Both of these cases sought a declaration in regard to other suits then pending in state courts in which ancillary proceedings in aid of execution were to be prosecuted but which HAD NOT BEEN COMMENCED prior to the institution of the declaratory judgment action. In the Quarles case immediately after the institution of the main action the insurance company filed a suit for declaratory judgment, and, while said suit was pending, a judgment was rendered against the assured, whereupon, the judgment creditor brought an action at law against the company to recover the amount of the judgment under a provision of the policy permitting such suit under such circumstances and after the last mentioned action had been instituted a motion to dismiss, which had been filed by the defendants in the suit for declaratory judgment, was brought up for hearing and allowed upon the ground that the granting of a declaratory judgment was a matter resting in the court's sound discretion and that the situation was not one which justified the granting of the relief prayed in the exercise of that discretion, the court finding that the controversy sought to be adjudicated by the Declaratory Judgment Act was one that could more properly be adjudicated in the action at law which Mrs. Quarles had instituted and which the company saw *in prospect* when it filed its bill and that a declaration of the rights of the parties *would not necessarily dispose of the entire controversy.* In affirming the judgment of the lower court the Circuit Court of Appeals for the Fourth Circuit said, pages 323, 324:

> "The federal Declaratory Judgment Act * * * is not one which adds to the jurisdiction of the court, but is a procedural statute which provides an additional remedy for use in those cases and controversies of which the federal courts already have jurisdiction. *Aetna Life Insurance Company* v. *Haworth*, 300 U. S. 227. * * * This being so there is no ground for applying the settled rule, * * *, that the courts may not decline the exercise of jurisdiction conferred upon them. The question is not as to whether jurisdiction shall be assumed but as to whether, in exercising that jurisdiction, a discretion exists with respect to granting the remedy prayed for."

And further the court said, page 325:

> "It is well settled that the declaratory remedy should not be invoked merely to try issues or determine the validity of defenses in pending cases."

The court further, after quoting Professor Borchard (Declaratory Judgments, 107-109), said, page 325:

> "The court will refuse a declaration where another court has jurisdiction of the issue, where a proceeding involving identical issues is already pending in another tribunal, *where a special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstance.*" (Italics ours.)

The language and decision of the *Quarles* case is clear. Under it, petitioner's motion was correctly decided by the District Court, and the Court of Appeals, by its reversal, simply refuses to apply the doctrine of the *Quarles* case.

In the case of *American Automobile Ins. Co.* v. *Freundt*, 103 Fed. (2d) 613 (CCA 7, 1939), the insurer

allowed the state court case against the insured to go to judgment and after an attorney had been employed for the purpose of filing garnishment proceedings against plaintiff and while garnishment proceedings on the judgment against the insurer under the policy were threatening, BUT BEFORE THEY HAD BEEN INSTITUTED, the insurer filed a declaratory judgment suit in the federal court. The District Court, in sustaining the motion of the *insured* and the *judgment creditor* to dismiss, said:

> "The court being further of the opinion that each and all of the defenses alleged to exist appear to be available to the plaintiffs in the action now pending in the state court between the defendants, and that relief sought herein will interfere with an action which is now pending in the state court, and the court being of the opinion that this is not a proper case for declaratory relief because of the pendency of the action in the state court between the defendants Freundt and Michal; * * *."

The Circuit Court of Appeals for the Seventh Circuit affirmed the lower court and in the course of the opinion discussed the situation, l. c. 617, in the following language:

> "In the instant case the legal justification for refusal to exercise jurisdiction may be found in the legislative purpose of the grant of power as well as the more general considerations of comity as between federal and state courts. The Supreme Court has held that the Declaratory Judgment Act is not jurisdictional but procedural only; and that it merely grants authority to courts to use a new remedy in causes over which they have jurisdiction. The roots of declaratory procedure are found in equity procedure, chiefly in the *quia timet* relief. *The wholesome purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing*

either to secure delay or to choose a forum. It was not intended by the act to enable a party to obtain a change of tribunal and thus accomplish in a particular case what could not be accomplished under the removal act, and such would be the result in the instant case. As stated above the question which plaintiff is seeking to have determined in the instant declaratory suit can be settled in the *threatened* garnishment proceeding in the state court and the general rule as to removal in this type of proceeding is as follows: 'If under that law (state law) the garnishment does not partake of the nature of an independent litigation but is merely auxiliary to and a dependency of the main action, supplemental to that action and a means of securing a satisfaction of the judgment rendered therein. It is not within the removable suits * * *.' Such a proceeding is not considered a 'suit of a civil nature at law or in equity' within the meaning of the removal act.

"The precise question here presented has not been passed upon by the Supreme Court; but the decisions of state and lower federal courts almost uniformly hold that there is a measure of discretion. In an authoritative work it is stated that '* * * the court has jurisdiction of the issue, where a proceeding involving identical issues is already pending in another tribunal, where a special statutory remedy has been provided, or where another remedy will be more effective or appropriate under the circumstances.' And in the same text, p. 110, it is stated that '* * * *where the defendant's action is about to begin or has begun*, it serves no sensible end to permit a plaintiff to appear as equitable actor and start the proceedings for an autonomous declaration that he has a good defense to his opponents' *pending* or *imminent* action." (Italics ours.)

To the same effect is the case of *Thompson, et al.*, v. *Moore*, 109 Fed. (2d) 372 (CCA 8, 1940), *supra*, which recognizes the principle declared in the Quarles and Freundt cases in the following language, l. c. 374:

> "* * *. It was not intended by the Declaratory Judgment Act to enable a party to obtain a change of tribunal and thus defeat the jurisdiction of the state court or 'accomplish in a particular case what could not be accomplished under the removal act.'"

Not only has respondent thus attempted to circumvent the removal statute but by its action and with the sanction of the lower court has removed the case into the United States District Court for the wrong district. Under the removal statute, Sec. 71, Ch. 3, Title 28, Code of Laws of the United States of America (Sec. 28 of the Judicial Code), the proper court to which this cause should have been removed would be the United States District Court for the Western Division of the Western District of Missouri, in which respondent originally filed a declaratory judgment action against all its judgment creditors as referred to aforesaid.

Conclusion.

Reference is made in the opinion to the fact that no claims were filed by petitioner with the receiver of Central. Of course, no claims were filed as petitioner had no standing to file a claim against Central until after he had obtained a judgment against Cooper-Jarrett and it could not proceed against Cooper-Jarrett so long as the organization proceedings of Cooper-Jarrett were pending under Sec. 77b in the National Bankruptcy Court or until after April 1, 1939, when the bankruptcy court entered an order permitting petitioner to withdraw his claim and prosecute it in the Circuit Court of Jackson County.

The court further criticizes petitioner for instituting garnishment proceedings against Central in violation of the order of the Circuit Court of Cook County and while this is immaterial, we think, in the present proceeding it might not be inappropriate to call the Court's attention to the fact that the courts of one state have a right to refuse to recognize an injunction issued by the courts of another state. *Cole* v. *Cunningham*, 133 U. S. 107, 10 S. Ct. 269, 37 L. ed. 538. *Kepner* v. *C. C. C. & St. L. Ry. Co.*, 322 Mo. 299, 15 S. W. (2d) 825; certiorari denied 280 U. S. 564, 50 S. Ct. 24, 74 L. ed. 618. *Frye* v. *Ry.*, 157 Minn. 52, 195 N. W. 629; certiorari denied 263 U. S. 723, 44 S. Ct. 231, 68 L. ed. 525. *Shaw* v. *R. R.*, 314 Mo. 123, 282 S. W. 416.

The lower court seems to overlook entirely the fact that it was unnecessary that appellee obtain a judgment on its garnishment proceedings against Central Mutual before he could proceed against the respondent. The contrary was specifically held by the Supreme Court of Missouri in the case of *Homan* v. *Employers Reinsurance Corporation*, 345 Mo. 650, 136 S. W. (2d) 289, and was tacitly admitted by counsel for respondent in the oral argument in the District Court (R. 38) so that the judgment against Cooper-Jarrett was ripe for the commencement of garnishment proceedings against respondent on April 22, 1939, and respondent waited nearly a year before it began the present suit which is some indication that it was really not disturbed or seeking an early adjudication of its rights as intimated in the opinion.

The facts in this case and the legal principles applicable thereto are closely akin, in fact for practical purposes identical, to those in the case of *Employers Liability Assurance Corp., Ltd.* v. *Ryan*, 109

Fed. (2d) 690, CCA 6, 1940; certiorari granted 310 U. S. 621, 60 S. Ct. Rpr. 1097, in which the Supreme Court undoubtedly granted a writ of certiorari because of the conflict between the Ryan case and the Quarles case. The conflict between this case, the Ryan case and the Quarles case is accentuated by the opinions in the Freundt and Thompson cases referred to above. The Ryan case, which is the only case holding the same as the lower court herein, is opposed by the Circuit Courts of Appeals of three other circuits and a certiorari was granted in the Ryan case which was subsequently dismissed pursuant to Rule 35 of this court, which provides for a stipulation of dismissal by the parties specifying the terms as respects costs and the payment to the clerk of any fee that may be due him.

Sections 5898 and 5899, R. S. Mo. 1929, being Sections 6009-6010 (See Appendix B) R. S. Mo., 1939, are nearly identical with Sections 9510-3, 4, General Code of Ohio, and by judicial construction have been integrated with Section 1396, R. S. Mo. 1929, being Section 1560, R. S. Mo. 1939, as a cumulative remedy. *Lajoie* v. *Central Western Cas. Co. of Detroit, Michigan,* 228 Mo. App. 701, 71 S. W. (2d) 803-804.

In no case except the Ryan case has it been held that a District Court has no discretion to prefer a special statutory remedy to that of a declaratory judgment. The opinion of the lower court wholly overlooks the respectable authority contrary to its holding.

Petitioner respectfully submits that the District Court, having heard the case, properly exercised its discretion. If the proceedings under the Missouri statutes do not warrant the discretionary action taken by the District

Court, then that court has no discretion at all in such cases and such is the holding of the lower court herein. However, a substantial line of cases in addition to those cited herein recognizes such discretion as vested in the District Court. Certainly said cases cannot all be wrong and only this case and the Ryan case right.

The Declaratory Judgment Act should be construed to limit and not to increase litigation, to simplify and not complicate it. The present suit and the declaratory judgment suit instituted in the Western Division of the Western District of Missouri in addition to the proceedings under the state statutes have simply added the additional burden of a trial in the District Court and appeal to the Circuit Court of Appeals and of this petition to this Honorable Court. As construed by the lower court the Declaratory Judgment Act merely extended and increased the burden of litigation. Such was not its intention as may be seen by a reference to the Senate Judiciary Report No. 1005, 73rd Congress, 2nd Session, and Professor Borchard's work on Declaratory Judgments. If for no other reason certiorari should be granted to reconcile the conflicts between the holdings of the Circuit Courts of Appeals in the 6th and 10th Circuits and those of the 4th, 7th and 8th Circuits.

The judgment of the Court of Appeals should, therefore, be reversed and that of the District Court affirmed.

Respectfully submitted,

CLARENCE C. CHILCOTT,
STUART T. MCALISTER,
Attorneys for Petitioner.

RATNER, MCALISTER & MATTOX,
Of Counsel.

APPENDIX A.

Declaratory Judgment Act.

Sec. 400, Title 28, Code of Laws of United States of America (Judicial Code 274d, 28 U.S.C.A. 400).

(1) In cases of actual controversy the courts of the United States shall have power upon petition, declaration, complaint, or other appropriate pleadings to declare rights and other legal relations of any interested party petitioning for such declaration, whether or not further relief is or could be prayed, and such declaration shall have the force and effect of a final judgment or decree and be reviewable as such.

(2) Further relief based on a declaratory judgment or decree may be granted whenever necessary or proper. The application shall be by petition to a court having jurisdiction to grant the relief. If the application be deemed sufficient, the court shall, on reasonable notice, require any adverse party, whose rights have been adjudicated by the declaration, to show cause why further relief should not be granted forthwith.

(3) When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.

APPENDIX B.

Sec. 1560, R. S. Mo. 1939, being Sec. 1396, R. S. 1929.

Sec. 1560. Who may be summoned as garnishees.—All persons shall be subject to garnishment, on attachment or execution, who are named as garnishees in the writ, or have in their possession goods, moneys or effects of the defendant not actually seized by the officer, and all debtors of the defendant, and such others as the plaintiff or his attorney shall direct to be summoned as garnishees.

Sec. 6009, R. S. Mo. 1939, being Sec. 5898, R. S. 1929.

Sec. 6009. Cancellation or annulment—when void.—In respect to every contract of insurance made between an insurance company, person, firm or association, whether a stock, a mutual, a reciprocal or other company, association or organization, and any person, firm or corporation, by which such person, firm or corporation is insured against loss or damage on account of the bodily injury or death or damage to property by accident of any person, for which loss or damage such person, firm or corporation is responsible, whenever a loss occurs on account of a casualty covered by such contract of insurance, the liability of the insurance company, if liability there be, shall become absolute, and the payment of said loss shall not depend upon the satisfaction by the assured of a final judgment against him for loss, or damage, or death, or if the insured becomes insolvent or discharged in bankruptcy during the period that the policy is in operation or any part is due or unpaid; occasioned by said casualty. No such contract of insurance shall be canceled or annulled by any agreement between the insurance company and the assured after the said assured has become responsible for such loss or damage, and any such cancellation or annulment shall be void.